87-1469

Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MAJOR GENERAL WILLIAM A. HORNSBY,
Etc., et al.,

Petitioners

v.

DAVID STINSON

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

1. Does this Court's Opinion in Chappell v. Wallace, 462 U.S. 296 (1983), which held that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations, preempt the employment of the analysis required under Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), to determine the justiciability of claims based upon alleged violations of rights protected by 42 U.S.C. Sections 1981 and 1983 filed by discharged military personnel?

PARTIES

In addition to the names contained in the caption, Petitioners include the Alabama National Guard, Major Ernest L. Shipp, individually and as an Officer of the Alabama National Guard; Lt. Col. John Q. Adams, individually and as an officer of the Alabama National Guard; George F. Hulsey, individually and as an officer of the Alabama National Guard. All other parties are named in the caption.

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V.

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PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE ELEVENTH CIRCUIT

The Petitioners, Major General William A. Hornsby, etc. et al., respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court

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*The other parties to this cause are Petitioners the ALABAMA NATIONAL GUARD, MAJOR ERNEST L. SHIPP, individually and as an Officer of the Alabama National Guard; LT. COL. JOHN Q. ADAMS, individually and as an officer of the Alabama National Guard; GEORGE F. HULSEY, individually and as an officer of the Alabama National Guard.

of Appeals for the Eleventh Circuit entered July 20, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987), and is reproduced as Appendix A hereto, infra. The order of the United States Court of Appeals for the Eleventh Circuit denying Petitioners Petition for Rehearing In Banc is not reported and is reproduced as Appendix B hereto, infra. The Opinion and Order of the United States District Court for the Middle District of Alabama, Northern Division, granting Petitioner's Motion to Dismiss is not reported and is reproduced as Appendix B hereto, infra.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 20, 1987. Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc was Denied on November 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT

1. On April 19, 1986, Respondent David Stinson filed a complaint in the United States District Court for the Middle District of Alabama alleging discrimination and seeking relief under Title 42 U.S.C Sections 1981, 1983 and 2000e-2000-17. The Respondent had been on active duty with the Alabama National Guard pursuant to Title 32 U.S.C. Section 502(f) and as such was a full-time uniformed federal member of the military. In his complaint, Respondent named his military supervisors, including the Adjutant

General of Alabama and the Alabama National Guard itself as defendants.

Respondent had filed administrative claims alleging racial discrimination with the United States Department of the Army, which resulted in an investigation within the command structure of the Alabama Army National Guard. On May 13, 1986, the Adjutant General of the Alabama National Guard submitted a final agency decision finding that Respondent had not been a victim of racial discrimination.

Petitioner filed a Motion to Dismiss the complaint, which the District Court granted on the grounds that Respondent had no grounds for relief pursuant to Title VII of the Civil Rights Act of 1964 and that, based

upon this Court's decision in Chappell v. Wallace, 462 U.S. 296 (1983), Respondent had no claim for relief pursuant to Title 42 U.S.C. Section 1981 and 1983.

2. Respondent Stinson appealed the granting of the Motion to Dismiss.

On July 20, 1987, the United States Court of Appeals, Eleventh Circuit, issued an opinion affirming the District Court on the Title VII issue, but remanded the Title 42 U.S.C. Sections 1981 and 1983 issues for analysis under Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

On August 6, 1987, Petitioner petitioned for Rehearing and Suggestion for Rehearing En Banc on the remand of the Title 42 U S.C. Sections 1981 and 1983 issues.

On November 6, 1987, the Eleventh Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.

REASONS FOR GRANTING THE PETITION

This case tests the application of this Court's opinion in Chappell. Essentially, if Chappell is held to establish that enlisted military personnel should not be allowed to maintain claims for damages against superior military officers for violations of constitutional rights during the course of their military service, then the limited review afforded by Mindes is no longer applicable for Bivens-type claims.

Mindes employed a factoring analysis to determine the justiciability of constitutional claims asserted by members of the armed forces against their superiors. The Mindes analysis requires a two-step evaluation. First, an internal military decision is nonreviewable unless the plaintiff asserts:

> "(a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes, or its own regulations and
>
> (b) exhaustion of available intra-service corrective measures."

Mindes, 453 F.2d at 201. Second, the reviewability of the claim must be examined by weighing four factors:

> "1. The nature and strength of the plaintiff's challenge to the

military determination. Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values....

2. The potential injury to the plaintiff if review is refused.

3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.

4. The extent to which the exercise of military expertise or discretion is involved...." Id.

The issue before this Court in Chappell was whether military personnel may pursue a Bivens-type action for damages against their superior officers to redress constitutional violations. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403

U.S. 388 (1971), (which authorized a suit for damages against federal officials whose actions violated an individual's constitutional rights, even though Congress had not expressly authorized such suits). In Chappell, five enlisted men brought a Bivens-type action against their military superiors claiming that because of their minority race, they were assigned undesirable duties, given low performance evaluations, threatened and given penalties of unusual severity.

The district court dismissed the complaint on the grounds that, inter alia, the actions complained of were nonreviewable military decisions and the Ninth Circuit reversed, requiring the application of a Mindes-type test to determine whether the actions at issue were reviewable by a civilian court. This Court reversed the Court of Appeals

and held that enlisted military personnel may not maintain a Bivens-type action for damages against their superior officers for alleged constitutional violations. Chappell 462 U.S. at 305.

In so holding, this Court recognized that "...the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline...." Id. at 301. Recognizing the necessity to maintain strict discipline and obedience to command within the military structure, the court also held that:

> "[c]civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship

is at the heart of the necessarily unique structure of the military establishment."

Id. at 300. The Court then concluded that "...the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers." Id. at 304.

2. This petition questions the continued application of the Mindes doctrine for Bivens-type claims in light of this Court's decision in Chappell. Chappell suggests that the Mindes test is no longer applicable to determine the justiciability of a claim predicated on Bivens.

Petitioners assert that Respondent's Bivens-type claims should be controlled by Chappell. The analysis required by Mindes conflicts with the reasoning of this Court in Chappell. The very matters that the Court said are not within the proper jurisdiction of the civil courts are required to be examined under the Mindes rule on remand of the instant case. In essence, the district court is required, under Mindes, to intrude into a military personnel decision to determine the justiciability of constitutional claims asserted by a member of the armed forces against his superiors. Such intrusion invites "second-guessing of military actions and tend[s] to overlap the remedial structure created within each service, which, according to Chappell, provides

an exclusive remedy subject to review only under the arbitrary and capricious standard". See Crawford v. Texas Army Nat. Guard, 794 F.2d 1034, 1036 (5th Cir. 1986). Consequently, respondent's alleged constitutional violations and claims based upon 42 U.S.C. Sections 1981 and 1983 are precluded by Chappell. Id.

Respondent seeks injunctive relief in the nature of reinstatement, with retroactive promotion and back-pay, to the Alabama National Guard. This type of relief should be treated no differently under Chappell from a claim for monetary damages. The nature of the lawsuit, rather than the relief sought, determines justiciability. Indeed, to allow an injunctive-relief exception to Chappell would only serve to swallow

Chappell's rule of deference. Crawford 794 F.2d at 1036.

There is a growing body of precedent following Chappell. The Fifth Circuit in Crawford noted that the Eight Circuit Court of Appeals, the Tenth Circuit Court of Appeals, and the Ninth Circuit Court of Appeals had "declared off limits Section 1983 claims by National Guard personnel", Brown v. United States, 739 F.2d 362, 366-67 (8th Cir. 1984), cert. denied, _____ U.S. _____, 105 S.Ct. 3524, 87 L.Ed.2d 650 (1985); Martelon v. Temple, 747 F.2d 1348, 1350-51 (10th Cir. 1984), cert. denied ____U.S.____, 105 S. Ct. 2675, 86 L.Ed.2d 694 (1985); Mollnow v. Carlton, 716 F.2d 627, 629-30 (9th Cir. 1983), cert. denied, 465 U.S. 1100, 104 S.Ct.

1595, 80 L.Ed.2d 126 (1984), Crawford 794 F.2d at 1036.

In addition to the instant case, only the First Circuit Court of Appeals has held that Chappell does not directly preclude the justiciability of a constitutional claim. See Penagaricano v. Llenza, 747 F.2d 55, 59 (1st Cir. 1984).

Petitioners urge that the instant facts present the same kind of case found nonjusticiable in Chappell and Crawford. As this court stated in United States v. Shearer, 473 U.S. 52, (1985):

> "To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions, for example, whether to overlook a particular

> incident or episode, whether to discharge a serviceman and whether and how to place restraints on a soldier's off-base conduct."

Shearer, 473 U.S. at 58.

CONCLUSION

Because there is conflict and confusion between decisions of the Courts of Appeal regarding the application of Chappell, and because the instant case presents an important question regarding the continued applicability of the Mindes doctrine in light of this Court's decision in Chappell, certiorari should be granted.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL

ROBERT L. RASH
ASSISTANT ATTORNEY GENERAL

APPENDIX A

Opinion of the United States

Court of Appeals

For the Eleventh Circuit

No. 86-7508

Entered: July 20, 1987

Before HILL, HATCHETT and HENDERSON, Circuit Judges.

HATCHETT, Circuit Judge:

On October 1, 1982, the Alabama National Guard employed David Stinson, a black resident citizen of Montgomery County, Alabama, on a full time basis, as Training NCO/System Supervisor. It terminated him on September 29, 1985. Stinson alleged that the Alabama National Guard prohibited and refused to allow him the opportunity to gain a supervisory position, allowed white

employees, with equal or fewer qualifications and experience, to gain supervisory positions, and allowed a less qualified white employee to act as supervisor over him. Stinson contends that his termination was due to racial discrimination.

FACTS

On September 5, Stinson filed a complaint alleging racial discrimination with the Department of the Army. On September 5, 1985, the complaint was received by Nelson V. Wood, Chief, The Army, National Guard Bureau, Washington, D.C. On November 5, 1985, Lt. Col. George Beck was directed to conduct a factual investigation of Stinson's complaint. On May 13, 1986, Maj. Gen. William Hornsby, Adjutant General, Alabama, submitted a final agency decision finding no discrimination.

PROCEEDINGS IN THE DISTRICT COURT

On April 19, 1986, Stinson filed a complaint in the United States District Court for the Middle District of Alabama, alleging discrimination and seeking relief under 42 U.S.C. Sections 1981, 1983, and 2000e-2000e-17. Stinson's complaint alleged that the Alabama National Guard engaged in racially discriminatory employment practices which had a disparate impact on him. Stinson contends that such discriminatory acts and practices violated his rights to due process and equal protection under the fourteenth amendment and his federal rights under Title VII, 42 U.S.C. Sections 2000e-2000e-17.

On April 30, 1986, General Hornsby moved to dismiss Stinson's complaint,

asserting that the district court was without jurisdiction under Title VII because Stinson had failed to exhaust administrative remedies; the military decision not to renew Stinson's tour of duty was nonreviewable; and the court was without subject matter jurisdiction to review Stinson's claim of racial discrimination against his military superiors.

In dismissing the complaint, the district court held that because Stinson was a full-time uniformed employee on military duty with the Alabama National Guard, Stinson had no claim for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. Sections 2000e-2000e-17. The district court also held that based upon Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586

(1983), Stinson had no claim for relief pursuant to 42 U.S.C. Sections 1981 and 1983.

DISCUSSION

Stinson claims that the district court erred in finding that both causes of action alleged in his complaint failed to state a claim upon which relief could be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), and subsequently in dismissing the complaint.

On appeal, we accept as true the allegations in Stinson's complaint in order to determine whether Stinson sufficiently stated a cause of action under Title VII or sections 1981 and 1983. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

A. Title VII Claim

[1] In 1964, Congress enacted

legislation that authorized members of the National Guard to perform additional training and duty beyond their regularly scheduled drills and periods of active duty. Title 32 U.S.C. Section 502(f); Pub.L. No. 88-621, Section 502(f), 78 Stat. 999, 1136 (1964).[1] Stinson was on full-time military duty with the Alabama National Guard pursuant to section 502(f) during the period of the misconduct alleged in this case.

In Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir.1981), the court, in declaring Title VII inapplicable to

1. The purpose of the enactment is to "provide protection for members of the National Guard who incur disability while they are (1) performing training or other authorized duty that is in addition to the regularly scheduled drills of their units, or the annual periods of 15 days of active duty for training...." S.Rep. No. 1584, 88th Cong., 2d Sess. 110 (1964), reprinted in 1964 U.S. Code Cong. & Admin. News 3800.

persons enlisted in the Armed Forces of the United States, including the National Guard, stated:

> We have previously held that 'neither Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the Armed Forces of the United States.' [Citation omitted.] We do not see any significant distinction, for Title VII purposes, between a member of the Army or Air Force and a member of the reserve component of those forces, the National Guard. In neither case is the relationship between the government and the member that of employer-employee; military service differs materially from civilian employment, whether public or private, and is not appropriately governed by Title VII. [Citation omitted.].

In Gonzales v. Dept. of the Army, 718 F.2d 926 (9th Cir. 1983), the court noted that the "military departments" consist of civilian employees, whereas the "armed forces" include uniformed military personnel, a distinction intended by Congress.

Stinson contends that because the Alabama National Guard is a state agency, it follows that an employer/employee relationship is created with the state. Stinson, however, was a uniformed member of, and on full-time military duty with, the Alabama National Guard. Title 10 U.S.C. Section 101 defines "armed forces" to include the Army, Navy, Air Force, Marine Corps, and the Coast Guard. Under 10 U.S.C. Section 3062(c)(1), the Army consists of:

> 1. The Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserves.

Other factors support the district court's determination that Stinson, for purposes of Title VII, should be considered military personnel, rather than

an employee of the state of Alabama: (1) Stinson wore a military uniform during periods of active duty and/or training; (2) he served on full-time military duty; (3) he was paid by the federal government and not by the state of Alabama; and (4) he was subject to military discipline on a daily basis. Thus, we conclude that Stinson, a member of the National Guard, is not an employee of the state of Alabama for purposes of Title VII. Compare Calhoun v. Doster, 324 F.Supp. 736 (M.D.Ala.1971) (district court found the distinction between defendant's state and federal positions blurred and

artificial).[2]

We recognize that the finding that Stinson is more military personnel than state employee is a close one. Such a finding, however, does afford Stinson the same treatment and remedies as those with whom he worked full time.

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2. The district court did not find that Calhoun's military position in the Alabama Air National Guard also established an employer/employee relationship with the state of Alabama as Stinson urges in this case. The district court ruled that "the defendant's military authority over the plaintiff is so inextricably intertwined with their civilian authority over him as to render any distinction between 'federal' and 'state' one of form, not substance." Calhoun, 324 F.Supp. at 740. Unlike Stinson, Calhoun held two separate and identifiable position: one as a civilian employee and the the other as military personnel.

2. Sections 1981 and 1983 Claims

[2] The Supreme Court in Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), held that enlisted military personnel are precluded from maintaining suits against superior officers to recover damages for injuries resulting from violations of constitutional rights in the course of military service. The Supreme Court in Chappell continued by noting that

> 'our citizens in uniform may not be stripped of basic rights simply because they doffed their civilian clothes.' [Citation omitted.] This Court has never held, nor do we how hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.

Chappell, 462 U.S. at 304, 103 S.Ct. at 2367. The court in Gonzales, stated that "[i]mplicit in the court's order

of remand is the recognition that, in some situations at least, uniformed members of the armed services may assert that their constitutional and statutory rights have been violated by their superiors." Gonzales, 718 F.2d at 929.

The Fifth Circuit in Mindes v. Seaman, 453 F.2d (5th Cir.1971), employed a factoring analysis to determine whether a particular constitutional claim asserted by members of the armed forces against their superiors are barred from suit. The Mindes analysis requires an independent two-step evaluation. First, an internal military decision should not be reviewed unless the plaintiff asserts:

> (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation

of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures.

Mindes, 453 F.2d at 201. Second, the reviewability of the claim must be examined by weighing the following four factors:

> 1. The nature and strength of the plaintiff's challenge to the military determination. Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values....
>
> 2. The potential injury to the plaintiff if review is refused.
>
> 3. The type and degree of anticipated interference with the

military function. Interference per se is insufficient since there will always be some interference when review is granted....

4. The extent to which the exercise of military expertise or discretion is involved.

Mindes, 453 F.2d at 201.

We find the approach adopted in Mindes binding in this action. The record does not indicate that the district court employed the Mindes test to determine whether Stinson's sections 1981 and 1983 claims were barred because of the military personnel exemption. Therefore, we reverse and remand to the district court with instructions to employ the Mindes test in determining whether Stinson's sections 1981 and 1983 claims are barred. Noting that the Mindes test provides for an evaluation

regarding exhaustion of available administrative remedies, we decline to address that issue now.

Our holding today is that members of the National Guard are generally employees of the state; but where the facts indicate that the person is on full-time military duty and other factors indicate that the person is more military than civilian, no Title VII action may be brought. As to other types of actions brought under statutes addressing discrimination, we hold only that the National Guard full-time member plaintiff must have the allegations of the complaint tested by the Mindes standard. Accordingly, we affirm in part, reverse in part, and remand.

AFFIRMED in part, REVERSED in part, and REMANDED.

HENDERSON, Senior Circuit Judge, specifically concurring:

I write separately to suggest that remand of the plaintiff's constitutional claims based on 42 U.S.C. Sections 1981 and 1983 for analysis under Mindes v. Seamen, 453 F.2d 197 (5th Cir.1971) may be unnecessary in light of the Supreme Court's rationale in Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). I concur in the decision of the panel, however, in deference to the precedential weight of Mindes. I take this opportunity to call attention to the recent interpretation of Chappell by the Fifth Circuit Court of Appeals, finding claims such as these nonjusticiable without resort to the cumbersome Mindes analysis, in the hope that this matter might be reexamined en banc and the utility of the Mindes test

reconsidered in light of more recent Supreme Court decisions.

In Chappell, enlisted military men brought an action against their superior officers seeking damages, declaratory judgment, and injunctive relief for alleged racial discrimination in assignments and performance evaluations. The Supreme Court of the United States analyzed the direct constitutional challenges in terms of whether they stated a cause of action under Bivens v. Six Unknown Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Analogizing to the doctrine established in Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), which held that the United States is not liable, under the Federal Tort Claims Act, for injuries to military personnel which "arise out of

or are in the course of activity incident to service," Id. at 146, 71 S.Ct. at 159, 95 L.Ed. at 161, the Court concluded that the unique disciplinary structure of the military establishment and Congress' activity in the field of military justice made it inappropriate to provide a Bivens-type remedy in this context. The Court stated:

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which... grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.

Chappell, 426 U.S. at 301, 103 S.Ct. at 2366, 76 L.Ed.2d at 591 [quoting Orloff

v. Willoughby, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953)]. The Court further found that:

> Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of complaints and grievances such as those presented by respondents.

Id. at 302, 103 S.Ct. at 2367, 76 L.Ed.2d at 592.

The Court echoed these concerns in United States v. Shearer, 473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985), while defending the Feres doctrine, concluding:

> To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions, for

> example, whether to overlook a particular incident or episode, whether to discharge a serviceman and whether and how to place restraints on a soldier's off-base conduct.

Id. at 58, 105 S.Ct. at 3044, 87 L.Ed.2d at 45.

The Fifth Circuit Court of Appeals, without relying on the two-part Mindes analysis, recently determined that Chappell and Shearer preclude judicial cognizance of constitutional claims brought by national guardsmen. In Crawford v. Texas Army National Guard, 794 F.2d 1034 (5th Cir. 1986), two members of the Texas Army National Guard brought suit against the Guard, the governor of Texas and twelve military personnel alleging violations of their rights under the Constitution and 42 U.S.C. Sections 1983 and 1985(2). The plaintiffs asserted that, in retaliation

for reporting criminal activity and racial discrimination by the Guard, they were dismissed or removed from active duty. The Fifth Circuit Court of Appeals affirmed the district court's dismissal of the action pursuant to Fed.R.Civ.P. 12(b)(6), finding no significant difference between such claims and those held impermissible in Chappell. The Crawford court reasoned that the constitutional due process and section 1983 causes of action advanced by the plaintiffs required "judicial second-guessing of military actions" and interfered with the military system of justice established within each service to the same extent as the Bivens claims rejected in Chappell. The section 1985(2) allegations were dismissed under the same rationale. Id. at 1036. The

appellate court declined to except the plaintiffs' prayers for injunctive relief from the reach of Chappell, finding that such an exception would "swallow" Chappell's rule of deference. Therefore, the court held that suits for injunctive relief, like those for money damages, must be carefully regulated to prevent intrusion into the military structure. Id. at 1037.

Conspicuously absent in Crawford is any application of the Mindes test for adjudicating charges of civil rights violations.[1] Clearly, the Court must

1. The Crawford court, in noting that several other circuits have found Section 1983 causes of action by national guardsmen nonjusticiable, specifically refers to the First Circuit's reliance on the Mindes test in addressing this question in Penagaricano v. Llenza, 747 F.2d 55, 59 (1st Cir.1984). Therefore, the Fifth Circuit

have found that the Supreme Court's opinions in this area are controlling. The instant facts present the same kind of case found nonjusticiable in Crawford and Chappell. Stinson's claims for reinstatement, back pay and injunctive relief under 42 U.S.C. Sections 1981 and 1983,[2] are challenges to military

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knowingly rejected the Mindes analysis in the context of Sections 1983 and 1985(2) claims for money damages. Nor is there any indication that the Crawford court applied Mindes to the guardsmen's request for injunctive relief.

2. Although Stinson is an employee of the federal government for purposes of Title VII, his charges of due process violations under Section 1983 against the Alabama National Guard, the Adjutant General, and other officers of the Guard appear to satisfy the state action requirement of Section 1983 since the Guard is a hybrid state-federal venture. See generally, New Jersey Air Nat'l Guard v. Fed. Labor Rel. Auth., 677 F.2d 276, 278-79 (3d Cir.1982); Ala.Code Sections 31-2-1 through 31-2-3(1975).

personnel decisions which would require a court to review his commanding officers' decisions concerning the promotion and dismissal of his men, determinations particularly dependent on the exercise of military discretion. Furthermore, Stinson had an opportunity to assert his grievances within the military system of justice, an opportunity which the defendants assert he has yet to exhaust. The military concerns found compelling in Chappell are equally present here. Therefore, Chappell can be read to support of the district court's dismissal of these claims on their face.

Although the Chappell decision expressly left open the right of military personnel to bring

constitutional grievances to court, there can be little doubt that such access does not extend to "discrete personnel matters." Crawford , 794 F.2d at 1036. Bodly stating this conclusion, as the Fifth Circuit Court of Appeals has done, without requiring the district courts to address the Mindes test would bring this circuit closer in line with the Supreme Court on this issue and would perhaps be fairer to potential litigants. In my opinion, the Crawford decision is a better approach for determining the propriety of hearing military disputes in our courts.[3]

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3. A more recent decision of the Fifth Circuit Court of Appeals casts some doubt on that circuit's position with respect to the Mindes test. In Holdiness v. Stroud, 808 F.2d 417 (5th Cir. 1987), the court affirmed the

HILL, Circuit Judge, dissenting.

The opinion for the panel by Judge Hatchett and the special concurring opinion of Judge Henderson illuminate this issue and the interplay of precedent. I can add nothing of value to the discussion.

I conclude that Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed. 586 (1983) directs the district court's

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dismissal of the plaintiff's action brought pursuant to Section 1983 and Section 1985 for failure to state a claim upon which relief could be granted. The suit was brought by a former member of the National Guard who sought damages from his superior officers for violation of federal constitutional and statutory rights when he was barred from reenlisting and terminated from his employment as a civil technician. The district court dismissed the § 1983 claims against four of the officers named in the complaint on the grounds that they were federal employees and thus, there was no state action. The plaintiff appealed. In addressing the plaintiff's § 1983 claim, the court found the requisite state action but noted that the Crawford decision held that § 1983 does not provide a cause of action for service connected disputes. The

dismissal of this case and I would, therefore, AFFIRM.

---

court, however, also referred to the First Circuit's opinion in Penagaricano, 747 F.2d 55, which applied the Mindes test in such instances. The Holdiness court then stated: "[w]e follow Crawford in applying the Chappell rule to Guard members, and using the tests in Chappell and Mindes, hold that the remedy sought by Holdiness would be so disruptive to military service that the claim should not be entertained by the federal courts." Holdiness, 808 F.2d at 423. The court did not remand the case to the district court for consideration terminated from his employment as a civil technician. The district court dismissed the Section 1983 claims against four of the officers named in the complaint on the grounds that they were federal employees nd thus, there was no state action. The plaintiff appealed. In addressing the plaintiff's Section 1983 claim, the court found the requisite state action but noted that the Crawford decision held that Section 1983 does not provide a cause of action for service connected disputes. The of the Mindes factors, evidently finding that step unnecessary in light of Crawford and Chappell.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-7508

DAVID STINSON,

Plaintiff-Appellant,

versus

MAJOR GENERAL WILLIAM A. HORNSBY, individually and as th adjutant General of the Alabama National Guard, State of Alabama, THE ALABAMA NATIONAL GUARD; MAJOR ERNEST L. SHIPP, individually and as an officer of the Alabama National Guard; LT. COL. JOHN Q. ADAMS, individually and as an officer of the Alabama National Guard; GEORGE F. HULSEY, individually and as an officer of the Alabama National Guard,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

---

ON PETITION FOR REHEARING AND
SUGGESTION OF REHEARING IN BANC
(Opinion July 20, 1987 , 11 Cir.,
____F.2d____).
(Nov. 6, 1987)

Before HILL, HATCHETT, Circuit Judges, and HENDERSON, Senior Circuit Judge

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing In Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule

35-5), the Suggestion of Rehearing In Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judgess in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

SIGNED
JOSEPH W. HATCHETT
United States Circuit Judge

APPENDIX C

ORDER OF THE U. S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

NO. 86V-385-N

Entered: June 16, 1986

ORDER

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that Defendants' motion to dismiss filed herein April 30, 1986, as amended May 16, 1986, be, and the same is hereby, granted and the above-styled cause is hereby dismissed with costs taxed against the Plaintiff, for which execution may issue.

It is further ORDEREED by this Court that Plaintiff's motion to compel filed herein May 30, 1986, be and the same is hereby, denied as moot.

DONE this 16th day of June, 1986.

SIGNED

ROBERT E. VARNER
UNITED STATES DISTRICT JUDGE

OPINION OF THE U. S. DISTRICT COURT

FOR THE MIDDLE DISTRICT OF

ALABAMA

NORTHERN DIVISION

No. 86V-385-N

Entered: June 16, 1986

OPINION

This cause is now before the Court on the Defendants' motion to dismiss

filed herein April 30, 1986, as amended May 16, 1986. Having considered Defendants' motion to dismiss, this Court is of the opinion that, for the reasons expressed below, the same is due to be granted.

FACTS

On April 9, 1986, Plaintiff filed herein the instant complaint alleging that he had been discriminated against by the Defendants on account of Plaintiff's race. Pursuant to said complaint, Plaintiff invoked the jurisdiction of this Court under 28 U.S.C. Sections 1331, 1343(3) and (4) and 42 U.S.C. Sections 2000-5(e), et seq. Plaintiff seeks relief under 42 U.S.C. Sections 1981, 1983 and 2000e(a)(1)(2).

Plaintiff, a black resident citizen of Montgomery County, Alabama, alleges that on October 1, 1982, he became employed by Defendant Alabama National Guard (167th Data Processing Unit) on a full-time basis as a Training NCO/System

Supervisor. Plaintiff further says that, at the time of his termination on September 29, 1985, he remained in said position as a result of Defendants' having prohibited and refused "to allow plaintiff the opportunity to gain a supervisory position while at the same time allowing white employees with the same or fewer qualifications and experience to gain such supervisory positions including allowing a less qualified white employee to be promoted and act as supervisor over plaintiff." Additionally, Plaintiff alleges that "the defendants have engaged in racially discriminatory employment practices which have had a disparate impact on plaintiff" and that the individual Defendants "knew or should have known of said practices and should have stopped

the same." As a result of such, Plaintiff contends that the alleged discriminatory acts and practices of Defendants have violated "his rights to due process and equal protection of the laws under the 14th Amendment and his federal right under Title VII [42 U.S.C. Section 2000(e)] not to be discriminated against because of his race."

Pursuant to their motion to dismiss, the Defendants contend that, as to each cause of action stated in Plaintiff's complaint, the same fails to state a claim upon which relief can be granted. Specifically, the Defendants contend (1) that Plaintiff has no claim for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq., and (2) that, under the

doctrine enunciated in Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2062, 76 L.Ed.2d 586 (1983), Plaintiff has no claim for relief under 42 U.S.C. Sections 1981 or 1983.

CONCLUSION

A. Plaintiff's Claim Under 42 U.S.C. Sections 2000e, et seq. As stated above, Plaintiff claims that 42 U.S.C. sections 2000e, et seq., provides him a cause of action for the alleged racial discrimination suffered by Plaintiff with respect to job promotions and termination from his full-time employment with Defendant Alabama National Guard. This Court cannot agree.

It appears well settled that the intention of Congress was to exclude military personnel from the purview of Title VII. As a result, courts have

uniformly held that neither Title VII nor its standards are applicable to members of the Armed Forces or members of the reserve components of those forces. See, Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1983); Helm v. California, 722 F.2d 507 (9th Cir. 1983); Gonzales v. Department of the Army, 718 F.2d 926 (9th Cir. 1983; Johnson v. Alexander, 572 F.2d 1219 (8th Cir.), Cert.den. 439 U.S. 986, 99 S.Ct. 579, 58 L.Ed.2d 658 (1978).

Accordingly, this Court is of the opinion that, since at all times relevant hereto Plaintiff was a full-time uniformed employee on

military duty with the Alabama National Guard,[1] then upon the basis of the foregoing authorities, Plaintiff has no claim for relief pursuant to 42 U.S.C. Sections 2000e, et seq.

B. Plaintiff's Claims Under 42 U.S.C. Sections 1981 and 1983. Finally, Plaintiff states causes of action pursuant to 42 U.S.C. Sections 1981 and 1983 for the alleged discriminatory conduct of the Defendants. Likewise, Defendants contend that, pursuant to Chappell v. Wallace, supra, Plaintiff has no claim for relief under either

1. At oral argument of Defendants' motion, heard in open Court on June 6, 1986, the parties stipulated that Plaintiff was a full-time uniformed employee of and on active duty with the Alabama National Guard.

Section 1981 or Section 1983. This Court agrees.

In Chappell, the United States Supreme Court considered the issue of whether enlisted military personnel may maintain suits to recover damages from senior officers for injuries sustained as a result of violations of constitutional rights in the course of military service. In holding that such actions were not available to military pesonnel, the Court held that the unique disciplinary structure of the military and Congress' previous activity in this area constituted "special factors" militating against recognition of a Bivens-type remedy for servicemen against their superiors. See, Chappell, supra, at 2366-2367. See also, Mollnow

v. Carlton, 716 F.2d 627 (9th Cir. 1983) and Holderfield v. Greene, Civil Action No. 83-G-1655-S (ND Ala. 1983), for application of the Chappell doctrine to members of the National Guard.

Accordingly, based upon the Chappell ruling, this Court is of the opinion that Plaintiff has no claim for relief pursuant to 42 U.S.C. Sections 1981 and 1983.

Therefore, Plaintiff's complaint is due to be dismissed in its entirety. An Order will be entered in accordance with this Opinion.

DONE this 16th day of June, 1986.

SIGNED
ROBERT E. VARNER
UNITED STATES DISTRICT JUDGE

ORIGINAL

NO. 87-1469

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

MAJOR GENERAL WILLIAM A. HORNSBY, ETC., ET. AL.,

PETITIONERS,

VS.

DAVID STINSON,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, David Stinson, hereby moves the Court to allow him to proceed in forma pauperis. His affidavit in support of this motion is attached as Exhibit A.

Submitted by,

Kenneth Shinbaum
McPhillips, DeBardelaben,
and Hawthorne
516 S. Perry Street
P.O. Box 64
Montgomery, Alabama 36101
(205)262-1911

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that prior to filing the foregoing or immediately thereafter. I caused to be delivered a true and correct copy of same, United States postage prepaid, and correctly addressed to Don Siegelman, Attorney General, and Robert L. Rash, Assistant Attorney General of the State of Alabama.

Done this the 31st day of May, 1988.

ATTORNEY FOR RESPONDENT

Exhibit A

NO. 87-1469

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

MAJOR GENERAL WILLIAM A. HORNSBY, ETC., ET. AL.

PETITIONERS,

VS.

DAVID STINSON

RESPONDENT.

AFFIDAVIT OF ACCOMPANY MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, David Stinson, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees or costs therefor, I state that because of my financial condition I am unable to pay the costs of said proceeding.

I further swear that the responses which I have made to the questions and instructions below, relating to my ability to pay the cost of prosecuting the appeal, are true.

1. Are you presently employed? yes

A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. Jackson National Insurance Company, P.O. Box 8873, Metairie, La. 70011-9990. Average $800.00 per month.

B. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest,

dividends, or other source? Yes

A. If the answer is yes, described each source of income, and state the amount received from each during the past twelve months. Approximately $7,500 from preparing tax returns. On rental property, I had a loss. Approximately $30.00 in interest.

3. Do you own any cash, checking or savings accounts?

A. If the answer is yes, state the total value of the items owned. Yes. I have approximately $50.00 in a checking account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes

A. If the answer is yes, describe the property and state its approximate value. I jointly own a home in which we might have $3,000 equity. I own a rental house in which I might have $5,000 equity. I jointly own a 1982 Toyota Cressida and a 1983 Toyota Celica, which we have approximately $2,000 equity.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Yvonnne Stinson, wife
Tania Stinson, daughter
Darryl Stinson, son
Brian Stinson, son

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

David Stinson

SUBSCRIBED AND SWORN TO before me this 30th day of May, 1987.

NOTARY PUBLIC

My Commission expires 1-15-92

NO. 87-849

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

MAJOR GENERAL WILLIAM A. HORNSBY, ETC., ET. AL.,

PETITIONERS,

V.

DAVID STINSON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Kenneth Shinbaum
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COUNSEL FOR RESPONDENT

NO. 87-1469

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

MAJOR GENERAL WILLIAM A. HORNSBY, ETC., ET. AL.,

PETITIONERS,

V.

DAVID STINSON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, David Stinson, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 821 F. 2d. 1537.

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QUESTION PRESENTED

1. Should this Court grant certiorari when this Court's opinion, Chappell v. Wallace, 462 U.S. 296, is not in conflict with the Opinion of the Eleventh Circuit Court of Appeals in this case and where, under the analysis required by Mindes v. Seaman 453 F. 2d. 197 (5th Cir. 1971), the District Court may dismiss this case in order for the Plaintiff to exhaust his remedies before the Army Board for the Corrections of Military Records?

PARTIES

Respondent adopts the Petitioner's statement with respect to the parties.

STATEMENT

The Respondent, David Stinson, adds the following to the Statement contained in the Petitioner's Petition for Writ of Certiorari.

On April 30, 1986, General Hornsby filed a motion to dismiss Stinson's complaint asserting that Stinson had failed to exhaust his administrative remedies. Further, in their brief to the Eleventh Circuit Court of Appeals, the Petitioner argued that David Stinson had not exhausted his administrative remedies because he had not availed himself of the administrative remedies available before the Army Board for Corrections of Military Records, pursuant to 10 U.S.C., Section 1552(a).

REASONS FOR DENYING THE PETITION

This Court, in Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d. 586 (1983), held that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged Bivens type constitutional tort violations. This Court further stated:

> "This Court has never held, nor do we now hold, that military are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military services."

Chappell, 462 U.S. at 304, 103 S. Ct. at 2368.

In footnote 3 of its decision, this Court stated:

> "We leave it for the Court of Appeals to decide on remand whether the portion of respondents' suit seeking damages flowing from an alleged conspiracy among petitioner in violation of 42 U.S.C. Section 1985(3) can be maintained."
>
> supra at p. 305.

Implicit in this Court's order of remand, in Chappell v. Wallace, supra, is the recognition that, in some situations at least, uniformed members of the Armed Services may assert that their constitutional and statutory rights have been violated by their superiors. Gonzalez v. Department of Army 718 F. 2d. 926 (9th Cir. 1983).

Unlike Bivens type constitutional tort violations, actions pursuant to 47 U.S.C. Sections 1981 and 1983 were created by Congress. In passing Sections 1981 and 1983, Congress did not create an exception for state military departments.

In Gonzalez, supra, although the Court did not decide whether Chappell v. Wallace precluded Section 1981 and Section 1983 claims, the Court did apply with modifications a balancing approach expressed in Mindes v. Seaman, 452 F. 2d. 197 (5th Cir. 1971). The first part of the test is that an internal military decision is unreviewable unless the Plaintiff alleges a violation of the Constitution, a federal statute, or military regulation; and has exhausted his available intraservice remedies. Gonzalez at p. 929. The second part of the test involves the following four factors:

1. The nature and strength of the Plaintiff's claim.

2. The potential injury to the Plaintiff if review is refused.

3. The extent of interference with military functions.

4. The extent to which military discretion or expertise is involved.

Gonzalez, supra at p. 929, 930.

In the present case, General Hornsby filed a motion to dismiss Stinson's complaint asserting that Stinson failed to exhaust his administrative remedies. Further, in their brief to the Eleventh Circuit Court of Appeals, the Petitioners argued that David Stinson had not exhausted the administrative remedies available before the Army Board for Corrections of Military Records, pursuant to 10 U.S.C. Section 1552(a).

In Crawford v. Texas Army Nat. Guard, 794 F. 2d. 1034 (5th Cir. 1986), the Fifth Circuit was faced with a case similar in nature to the present case. In Crawford, although the Court affirmed a dismissal of a Section 1983 action based on Chappell, they modified the dismissal to be without prejudice to the reviewability of any future actions taken by the Army Board for the Corrections of Military Records, Crawford, supra at p. 1037.

Similarly in the present case, the Eleventh Circuit remanded Mr. Stinson's case back to the District Court, in order that it might be determined if Mr. Stinson had exhausted the administrative remedies before the Army Board for Corrections of Military Records, 821 F. 2d. at 1541. As a matter of fact, General Hornsby urged the Court to take this position because, in their brief, he argued that David Stinson had not exhausted his administrative remedies. (See pages 12 and 13 - Brief of Appellants).

Although the decisions of the Eleventh Circuit, in the present case, and the decision of the Fifth Circuit in Crawford

may be worded differently, the end results will be the same. The case will end up before the Army Board for Corrections of Military Records.

The present case is not an appropriate one for this Court to tackle the difficult issue as to whether an individual may maintain a Section 1981 and 1983 action against a state military department or its individual officers. Thus, the petition for writ of certiorari should be denied.

CONCLUSION

The issue of whether or not a member of a state National Guard may bring an action, pursuant to 42 U.S.C. Sections 1981 and 1983, against a state military department, or its officers, should not be decided in the present case, since it has not been shown that David Stinson can overcome the test described in Mindes v. Seaman, supra. Therefore, Respondent would contend that there is not an actual controversy before this Court and thus the Petition for Writ of Certiorari should be denied.

Submitted by

OF COUNSEL:

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and HAWTHORNE
516 S. Perry Street
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Montgomery, Alabama 36101
(205)262-1911

Kenneth Shinbaum
Attorney for Respondent

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that, prior to the filing the foregoing or immediately thereafter, I caused to be delivered a true and correct copy of same, United States postage prepaid and correctly addressed to Don Siegelman, Attorney General of the State of Alabama, and Robert Rush, Assistant Attorney General of the State of Alabama.

Done this the 31st day of May, 1988.

Kenneth Shinbaum

Supreme Court, U.S.
FILED
OCT 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1469

In the Supreme Court of the United States

OCTOBER TERM, 1988

MAJOR GENERAL WILLIAM A. HORNSBY, ET AL.,
PETITIONERS

v.

DAVID STINSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General
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Assistant Attorney General
DONALD B. AYER
Deputy Solicitor General
CHRISTOPHER J. WRIGHT
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Assistants to the Solicitor General
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QUESTION PRESENTED

Whether the test devised in *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971), should be used to determine whether a servicemember in the National Guard may bring suit under 42 U.S.C. 1981 or 1983 challenging a personnel decision made by superior officers.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1469

MAJOR GENERAL WILLIAM A. HORNSBY, ET AL.,
PETITIONERS

v.

DAVID STINSON

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. In October 1982, respondent, David Stinson, a black male, joined the Alabama National Guard on a full-time basis as a Training NCO/System Supervisor (Pet. App. A1). He served in the Active Guard/Reserve (AGR) Program, which is a military program authorized under 32 U.S.C. 502(f) whereby Guard personnel serve in a "full-time duty status, for the purpose of organizing, administering, recruiting, instructing, or training the reserve components of the National Guard." Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, 97 Stat. 631. As a full-time uniformed soldier in the AGR Program, re-

spondent received pay from the United States, was entitled to benefits provided by law to servicemembers on federal active duty, and was required to adhere to the standards of conduct demanded of servicemembers on federal active duty. See National Guard Regulation (NGR) 600-5, paras. 1-7 & 3-14 (May 15, 1986).[1] Respondent's daily activities, however, were controlled by state officials in the Alabama National Guard (see 32 U.S.C. (Supp. IV) 101(19)).

In March 1985, a white male was selected for a supervisory position Stinson had sought. Stinson filed a complaint with the Equal Employment Opportunity Commission, which informed him on May 31, 1985, that it lacked jurisdiction because he was a member of the armed forces. Stinson then filed a complaint with the National Guard Bureau pursuant to NGR 600-21 (Aug. 15, 1985) alleging that he had been denied the position on account of his race. While his complaint was pending, Stinson completed his tour of duty and was not recommended for renewal by his immediate supervisor because of poor job performance (Affidavit of George F. Hulsey, Mar. 13, 1986). He was then separated from the Guard in September 1985.

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[1] The National Guard is "an integral part of the first line defenses of the United States" (32 U.S.C. 102). The purpose of the Guard "is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency and at such other times as the national security requires" (10 U.S.C. 262). All members of the state National Guards have a dual status in that they are also members of the National Guard of the United States, which is a reserve component of the Army and Air Force (see 10 U.S.C. 101(11) and (13)) established under Art. I, § 8, Cl. 12 (congressional authority to raise and support armies). The constitutional authority for federal control and oversight of the Guard in its state capacity is located in Art. I, § 8, Cls. 15 (congressional authority to call forth the militia) and 16 (congressional authority to organize, arm, and discipline the militia). The President prescribes regulations and issues orders necessary to organize, discipline, and govern the National Guard (32 U.S.C. 110), and he is empowered to call the Guard into national service (10 U.S.C. 3500).

The investigation into Stinson's charge that he had been discriminatorily denied the supervisory position he sought continued. Lieutenant Colonel George Beck, a Judge Advocate General officer in the Alabama National Guard who had personally interviewed Stinson's supervisors and co-workers, concluded that Stinson had been denied the position for nondiscriminatory reasons.[2] In May 1986, the Alabama Adjutant General, Major General William Hornsby, filed a final decision in which he concluded that respondent's allegation of discrimination in the denial of the promotion lacked merit (Pet. App. A2). The National Guard Bureau, an adjunct of the United States Departments of the Army and the Air Force (10 U.S.C. (Supp.

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[2] Beck's report stated: "While SSG Stinson appears to possess higher educational qualifications and military formal education as a Training NCO than SSG Whetsone [the person who was selected for the supervisory position], * * * additional qualifications for the job were lacking in SSG Stinson. For example, Commander Shipp indicates that he chose SSG Whetstone to fill the vacancy over SSG Stinson because of SSG Stinson's poor military attitude and inability to properly follow orders. Observations by MSG Gillilard and CW2 George F. Hulsey, Jr. illustrate SSG Stinson's apparent lack of ability to follow the SOP [Standard Operating Procedures] and unit guidelines. CW2 George F. Hulsey, Jr. has counseled SSG Stinson many times about his inability to properly complete military documents. Both MSG Gillilard and CW2 Hulsey indicate that the unit has received numerous complaints from higher headquarters because of SSG Stinson's inability to adequately and completely follow the State and Unit SOP." Findings and recommendation of Lt. Col. George L. Beck, Jr., regarding Discrimination Complaint filed by SSG Stinson at 1-2 (Apr. 16, 1986). Beck also noted that "[n]one of SSG Stinson's Supervisors nor co-workers consider race to have been a factor in making the assignment," that "[t]raining operations [in which SSG Stinson has been involved] received more than usual criticism from headquarters," that "[b]lacks interviewed deny any racial discrimination and believe that blacks and whites are treated equally within the unit," and that "[n]one of SSG Stinson's supervisors consider[ed] SSG Stinson to be doing a satisfactory job in his assignment" (*id.* at 2).

IV) 3040), reviewed the decision and concurred with the state's finding. Letter from the Chief of the National Guard's Office of Human Resources to the Alabama Adjutant General (Aug. 5, 1986).

2. On April 9, 1986, while his charge of discriminatory denial of the supervisory position was pending, Stinson filed this action in the United States District Court for the Middle District of Alabama. He named four superior officers as defendants in their individual and official capacities and alleged that the Alabama National Guard had engaged in racially discriminatory and retaliatory employment practices in refusing to advance him to the supervisory position and in terminating his employment. He sought relief under Title VII, 42 U.S.C. 2000e *et seq.*, and under 42 U.S.C. 1981 and 1983. Specifically, he sought reinstatement and advancement, back pay, injunctive relief, and other further relief which the court might deem appropriate.

The district court dismissed Stinson's action for failure to state a claim upon which relief could be granted (Pet. App. C1-C11). With respect to Stinson's Title VII claim, the court stated that "courts have uniformly held that neither Title VII nor its standards are applicable to members of the Armed Forces or members of the reserve components of those forces" (*id.* at C7-C8). Since Stinson "was a full-time uniformed employee on military duty with the Alabama National Guard" (*id.* at C8-C9), the court concluded that he had no claim pursuant to Title VII.

Guided by *Chappell* v. *Wallace*, 462 U.S. 296 (1983), the court rejected Stinson's claims under Sections 1981 and 1983 as well. The Court in *Chappell* had held that, in light of the unique disciplinary structure of the armed forces, military personnel may not bring discrimination claims against superior officers and seek a remedy under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court con-

cluded that the same result should follow in the case of Sections 1981 and 1983 claims, which it considered analogous to *Bivens* claims (Pet. App. C9-C11).

3. The court of appeals affirmed the dismissal of Stinson's Title VII claim,[3] but reversed the dismissal of his claims under Sections 1981 and 1983 (Pet. App. A1-A27). With respect to the Sections 1981 and 1983 claims, the court first observed that this Court in *Chappell* stated that it had not held that " 'military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service' " (Pet. App. A11 (quoting 462 U.S. at 304)). The court of appeals then held that full-time servicemembers in the National Guard who bring actions for constitutional violations under Sections 1981 or 1983 must have the allegations in their complaints tested for reviewability pursuant to the two-step procedure articulated in *Mindes* v. *Seaman*, 453 F.2d 197, 201 (5th Cir. 1971). Under *Mindes*, a court first determines whether a servicemember alleging a violation of a constitutional right, a statute, or a regulation has exhausted his intraservice remedies. If he has, the court then examines the facts alleged and balances four factors—the nature and strength of the plaintiff's claim, the potential injury to the plaintiff if review is refused, the anticipated extent of interference with military functions if the claim is reviewed, and the extent to which military expertise and discretion was involved in the challenged action—to determine whether the plaintiff may proceed. Pet. App. A12-A14; 453 F.2d at 201-202. The court of appeals remanded the case to the district court with instructions that it use the *Mindes* test to determine whether Stinson may proceed

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[3] The court of appeals agreed with the district court that Stinson "was a uniformed member of, and on full-time military duty with, the Alabama National Guard" (Pet. App. A8) and that Title VII's remedies are not available to members of the armed forces (*id.* at A7). The Title VII claim is no longer at issue.

with his claims under Sections 1981 and 1983 (Pet. App. A14).

Senior Judge Henderson concurred, stating that his agreement with the decision stemmed from "deference to the precedential weight of *Mindes*" (Pet. App. A16). He further stated, however, that the en banc court should reexamine the applicability of that case in light of *Chappell* and consider whether "claims such as these [are] nonjusticiable without resort to the cumbersome *Mindes* analysis" (*ibid.*). He concluded: "Although the *Chappell* decision expressly left open the right of military personnel to bring constitutional grievances to court, there can be little doubt that such access does not extend to 'discrete personnel matters.' Boldly stating this conclusion, as the Fifth Circuit Court of Appeals has done [in *Crawford* v. *Texas Army Nat'l Guard*, 794 F.2d 1034 (5th Cir. 1986)], without requiring the district court to address the *Mindes* test would bring this circuit closer in line with the Supreme Court on this issue and would perhaps be fairer to potential litigants." Pet. App. A24-A25 (footnote and citation omitted).

Judge Hill dissented, agreeing with the district court that *Chappell* required the dismissal of Stinson's claims (Pet. App. A26-A27).

The court of appeals denied the defendants' suggestion of rehearing en banc (Pet. App. B1-B3).

DISCUSSION

In our view, the court below erred in concluding that it is appropriate to examine Stinson's claim under the *Mindes* test to determine whether it is justiciable. Rather, like the Fifth Circuit in *Crawford* v. *Texas Army Nat'l Guard*, 794 F.2d 1034 (1986) and the Tenth Circuit in *Martelon* v. *Temple*, 747 F.2d 1348 (1984), cert. denied, 471 U.S. 1135 (1985), the court should have concluded that servicemembers may challenge personnel decisions

only through the remedies created specifically for that purpose. For the reasons given below, however, we believe that this conflict between the courts of appeals has little practical importance in the present context of this case, and that review is therefore not warranted.

1. By its literal terms, Section 1983 could be read to apply to a suit brought by a servicemember of a state national guard against his superior officers for an alleged deprivation "of any rights, privileges, or immunities secured by the Constitution and laws" (42 U.S.C. 1983). Congress's failure expressly to exempt the military from such suits cannot, however, be understood as a determination that all such suits fall within the scope of Section 1983. To the contrary, this Court's cases indicate that, in the absence of clear and explicit congressional intent, a general statute such as Section 1983 should not be construed to encompass claims by soldiers against their superior officers for discrete military personnel decisions.

The Constitution gives Congress the power "[t]o raise and support Armies," "[t]o provide and maintain a Navy," "[t]o make Rules for the Government and Regulation of the land and naval Forces," and "[t]o provide for organizing" and "calling forth the Militia." U.S. Const. Art. I, § 8, Cls. 12-16. These powers are "broad and sweeping" (*United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)), and it is well established that, in the regulation of the military, the role of the courts is decidely subordinate to that of Congress. "[P]erhaps in no other area has the Court accorded Congress greater deference. * * * Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981). Indeed, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

Congress, in turn, has recognized that substantial discretion must be afforded to the military in molding an effective fighting force. *Brown* v. *Glines*, 444 U.S. 348, 360 (1980). "To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). For this reason, "the military is, by necessity, a specialized society separate from civilian society. * * * [T]he military has, again by necessity, developed laws and traditions of its own during its long history." *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). These "laws and traditions * * * are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress." *Schlesinger* v. *Councilman*, 420 U.S. at 757.

Courts, therefore, have been especially reluctant to intervene in any matter which "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman." *United States* v. *Shearer*, 473 U.S. 52, 58 (1985). The "complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (emphasis omitted). On such matters, it is not appropriate for a "civilian court to second-guess military decisions." *United States* v. *Shearer*, 473 U.S. at 57.

In view of these principles, it would be inappropriate for courts to presume that a statute of general applicability in civilian contexts applies equally to military decisions. In the military context, this Court has always looked for an express mandate before exercising its jurisdiction in a way that might interfere with the smooth functioning of the military. See, *e.g.*, *Feres* v. *United States*, 340 U.S. 135 (1950) (declining to apply Federal Tort Claims Act to suits

by servicemen for service-related injuries); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953) (declining to review propriety of duty assignment); *Burns* v. *Wilson*, 346 U.S. 137, 142, 144 (1953) (plurality opinion) (giving narrow interpretation to scope of federal habeas corpus relief available to servicemen); *Gilligan* v. *Morgan*, 413 U.S. at 10 (declining to assume jurisdiction over training, weaponry and orders of National Guard); *Schlesinger* v. *Councilman*, 420 U.S. at 757-758 (limiting ability of servicemen to obtain injunctive relief for alleged wrongs, including constitutional violations); *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) (refusing to permit military personnel to maintain suit to recover damages from a superior officer for alleged constitutional violations); *Department of the Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988) (declining to permit Merit Systems Protection Board, in the course of reviewing an adverse action suffered by a civilian employee of the Navy, to review security clearance determination made by the Navy).

It is against the background of these cases that the propriety of respondent's suit must be judged. It cannot be assumed, simply because Congress has provided a general remedy against violations by state officials of constitutional and statutory rights, that Congress intended that remedy to apply to suits by servicemembers in the state National Guard against their superior officers. Rather, in the absence of clear and explicit congressional intent, the "peculiar and special relationship of the soldier to his superiors" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954)) counsels against recognizing claims by soldiers against their superior officers. "[C]ourts must be careful not to 'circumscribe the authority of military commanders to an extent never intended by Congress.' " *Brown* v. *Glines*, 444 U.S. at 360 (citation omitted).[4]

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[4] The vitality of the principle that it should not be presumed that Congress intended to permit suit by a servicemember against his

In the instant case, therefore, the threshold inquiry should be whether Congress specifically intended the relevant statutes to be used by soldiers to sue their superior officers, a question the court below failed to address. Had it done so, it would have found no affirmative evidence, either in the statutory language of the legislative history, that Congress explicitly intended Sections 1981 and 1983 to provide causes of action for soldiers who allege injuries suffered incident to military service. See *Martelton* v. *Temple*, 747 F.2d at 1351; cf. *Allen* v. *McCurry*, 449 U.S. 90, 98-99 (1980) (discussing legislative history of Section 1983); *Runyon* v. *McCrary*, 427 U.S. 160 (1976) (discussing legislative history of Section 1981); *Mahone* v. *Waddle*, 564 F.2d 1018 (3d Cir. 1977) (discussing Sections 1981 and 1983), cert. denied, 438 U.S. 904 (1978). In the absence of express evidence that Congress intended Sections 1981 and 1983 to be used by soldiers to sue their superior officers, such claims should not be permitted, and analysis under the *Mindes* test is not necessary.

2. This Court found application of the *Mindes* test unnecessary in *Chappell*. In that case, black Navy enlisted men, claiming that they had suffered discrimination, sought relief under *Bivens*. The Ninth Circuit, like the court below, decided that "the *Mindes* test * * * provides an appropriate framework for determining which military decisions are reviewable and which are not" (*Wallace* v. *Chappell*, 661 F.2d 729, 734 (1981)), and remanded the case for the district court to apply that test (*id.* at 738). This Court reversed, concluding that the "special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by

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superiors in the absence of specific evidence is not diminished by the facts that the National Guard is involved here. The command relationship among National Guard servicemembers is identical to the command relationship among other federal servicemembers. See *Gilligan* v. *Morgan*, 413 U.S. at 7; n.1, *supra*.

enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command" (462 U.S. at 304). The Court also noted that the Board for Correction of Naval Records, whose decisions may be reviewed only under the arbitrary and capricious standard, is a forum in which the plaintiffs could seek relief (*id.* at 303).[5] The Court held that "military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (*id.* at 305).

The Fifth Circuit and the Tenth Circuit have correctly concluded, on reasoning analogous to that in *Chappell*, that military personnel in the National Guard are barred from challenging personnel decisions under Section 1983. In *Martelon*, the Tenth Circuit first noted that this Court's decision in *Chappell* was based on the conclusion that " '[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment" (747 F.2d at 1350 (quoting 462 U.S. at 300)). The difference between the *Bivens* suit in *Chappell* and the Section 1983 suit before it, the court concluded, was merely "the identity of the defendants" (747 F.2d at 1350). Since "[b]y the passage of § 1983, Congress never intended" to authorize actions by members of the armed forces alleging "liability on the part of military

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[5] Boards for the Correction of Military Records, which are composed of civilians appointed by the Secretary of each branch of the armed forces, constitute broad avenues by which servicemembers may obtain federal court review of a variety of claims pertaining to their service records. Congress has vested each Secretary, acting through such a Board, with plenary power to "correct any military record * * * when he considers it necessary to correct an error or remove an injustice" (10 U.S.C. 1552(a)). In appropriate cases the Board may issue orders leading to reinstatement and an award of back pay (10 U.S.C. 155(c)).

superiors" (*id.* at 1351), the court concluded, without analysis under *Mindes*, that the "plaintiff's § 1983 claim has no merit" (*ibid.*).

The Fifth Circuit in *Crawford* similarly concluded that "Section 1983 * * * claims, like those predicated on *Bivens*, invite judicial second-guessing of military actions and tend to overlap the remedial structure created within each service" (794 F.2d at 1036). It accordingly held, without applying the *Mindes* test, that the plaintiff's "requests for money damages, to the extent they are based upon alleged constitutional violations and 42 U.S.C. § 1983, are precluded by *Chappell*" (*ibid.*). The court went on to reject the plaintiff's contention that he could seek injunctive relief in the form of reinstatement. While the Court in *Chappell* had stated that "military personnel are [not] barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service" (462 U.S. at 304), the Fifth Circuit noted that this Court had never authorized suit challenging "military personnel decisions" (794 F.2d at 1036). Rather, the Fifth Circuit correctly noted that the Court had authorized only "challenges to the facial validity of military regulations [that] * * * were not tied to discrete personnel matters" (*ibid.*).[6] The Fifth Circuit further concluded that extending the exception noted in *Chappell* to allow military per-

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[6] The court in *Chappell* cited (462 U.S. at 304-305), as exemplifying the cases where this Court had allowed military personnel to seek injunctive relief, *Brown* v. *Glines*, 444 U.S. 348 (1980) (challenge to a regulation requiring prior approval for soliciting signatures on a petition); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (challenge to a statute requiring female members of the armed forces, but not males, to prove that their spouses were dependent on them for over one-half of their support in order to obtain certain benefits); and *Parker* v. *Levy*, 417 U.S. 733, 741 (1974) ("void for vagueness" challenge to

sonnel to challenge personnel actions by seeking injunctive relief "could swallow *Chappell*'s rule of deference" (*ibid.*).[7]

In contrast, like the court below, the First Circuit concluded in *Penagaricano* v. *Llenza*, 747 F.2d 55 (1984), that the *Mindes* test should be used to determine whether a member of the National Guard could seek reinstatement. Rather than remanding to the district court (see *id.* at 60 n.7), however, the court analyzed the plaintiff's claim under *Mindes* (*id.* at 61-64) and concluded that the plaintiff's claim was not justiciable (*id.* at 64). Similarly, in *Christoffersen* v. *Washington State Air Nat'l Guard,* No 85-4315 (Aug. 31, 1988), slip op. 10, the Ninth Circuit found it unnecessary to "decide whether *Chappell* bars any or all section 1983 claims for alleged civil rights violations

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provisions of the Uniform Code of Military Justice); see also *Goldman* v. *Weinberger,* 475 U.S. 503 (1986) (challenge to a regulation prohibiting the wearing of a yarmulke).

In addition to challenging the facial validity of military regulations, a servicemember claiming constitutional flaws in his conviction by a court-martial can—after appealing through several layers of intramilitary review, culminating in the Court of Military Appeals (10 U.S.C. 864-869)—seek relief in federal court either by petitioning for a writ of certiorari (10 U.S.C. (Supp. IV) 867h(1)) or seeking a writ of habeas corpus. *Burns* v. *Wilson,* 346 U.S. 137 (1953).

[7] In *Holdiness* v. *Stroud,* 808 F.2d 417, 423 (1987), the Fifth Circuit concluded: "[W]e follow *Crawford* in applying the *Chappell* rule to Guard members and, using the tests in *Chappell* and *Mindes,* hold that the remedy sought by Holdiness [damages under Section 1983] would be so disruptive to military service that the claim should not be entertained." While this statement might be taken to suggest that the *Mindes* analysis is applicable in determining the justiciability of a National Guard members' Section 1983 claim, the court simply dismissed the claim without specficially considering the *Mindes* analysis or remanding to the district court for that purpose. Accordingly, *Holdiness* does not fairly stand for the proposition that the *Mindes* analysis must be worked through in order to determine whether to dismiss challenges to personnel decisions brought under Section 1983.

by military personnel." Instead, the court applied the *Mindes* test to the plaintiff's claims for reinstatement and damages, and concluded that those claims were non-justiciable under *Mindes* (slip op. 18).

There is, therefore, disagreement in the courts of appeals as to whether the *Mindes* test has any continuing vitality in determining whether members of the National Guard may challenge personnel decisions under the post-Civil War civil rights statutes.[8] The approach taken by the court below and the First and Ninth Circuits—determining justiciability under *Mindes*—differs from the approach taken by the Fifth and the Tenth Circuits. It appears, however, that most actions challenging personnel decisions would be dismissed under the *Mindes* test in any event, as in *Penagaricano* and *Christoffersen,* since such actions by their nature interfere with military decision-making. The first two *Mindes* factors, which concern the potential harm to the plaintiff if his claim is not heard, will generally favor review, while the last two factors, which concern the harm to the military if the claim is heard, will generally favor dismissal of the claim. Since the *Mindes* court "indicate[d] that the above factors should be balanced but declined to indicate how they should be weighted" (747 F.2d at 63), the test is itself of little help in

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[8] In addition to the post-*Chappell* decisions of the First, Fifth, Ninth, Tenth, and Eleventh Circuits discussed in the text, the Eighth Circuit, in *Brown* v. *United States,* 739 F.2d 362, 369 (1984), cert. denied, 473 U.S. 904 (1985), employing a test derived from *Feres* and *Chappell,* concluded that a National Guard member could not sue his superior officers under Sections 1981 and 1983, but could seek relief from his fellow Guard members for actions unrelated to military training or personnel decisions. See also *Jorden* v. *National Guard Bureau,* 799 F.2d 99, 108 (3d Cir. 1986), cert. denied, No. 86-1382 (Oct. 5, 1987) (permitting suit for equitable relief but not damages), discussed at pp. 15-18, *infra.*

deciding particular cases involving personnel decisions. The First Circuit was "inclined to weigh the last two factors heavily in view of the reservations many courts have expressed as to a civilian court's authority to countermand a military decision or order that is within the decisionmakers's sphere of discretion and expertise" (*id.* at 63-64). That approach, which makes sense, will almost always lead to the conclusion that a claim challenging a personnel decision is barred.

We believe nonetheless, that application of the *Mindes* test, which requires courts to consider how military expertise and discretion affected a particular decision, itself constitutes undesirable judicial interference. As this Court stated recently in *United States* v. *Stanley,* No. 86-393 (June 25, 1987), slip op. 12-13: "A test for [justiciability] * * * that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters * * *. Even putting aside the risk of erroneous judicial conclusions (which becloud military decision-making), the mere process of arriving at correct conclusions would disrupt the military regime." Thus, the approach of the court below and the First and Ninth Circuits will necessarily intrude on the military to some extent. But until a lower court actually holds, after analysis under the *Mindes* test, that a discrete military personnel decision is cognizable under Section 1983, there is no pressing need for this Court to decide

whether the *Mindes* test should be applied to determine whether a claim is justiciable.

3. The Third Circuit, in *Jorden* v. *National Guard Bureau, supra,* adopted an approach that differs from that of any other court of appeals. It held that a member of the National Guard who was dismissed could not seek damages under Section 1983. Relying, however, on this Court's statement in *Chappell* that not all claims against the military for constitutional violations are barred (799 F.2d at 109), the court held that the plaintiff could seek reinstatement (*id.* at 111). The court noted that it had rejected the *Mindes* test (*id.* at 111 n.16), but instead, under *Dillard* v. *Brown,* 652 F.2d 316 (3d Cir. 1981), "heavily disfavors finding injunctive relief claims against the military non-reviewable" (799 F.2d at 110). Concluding that the plaintiff's claim for reinstatement was not an "extreme case," the court held that the claim was justiciable (*id.* at 111).

The Third Circuit's approach could regularly call military decisions directly into question whenever the plaintiff seeks injunctive relief. Despite the broad language of the opinion, however, the court's holding in *Jorden* was narrowly premised on a complete absence of any intraservice remedies (799 F.2d at 102 n.5). In that case, the Pennsylvania Air National Guard apparently conceded (see *id.* at 102) that there were no remedies within the Guard available to Jorden. Moreover, although Jorden had sought federal intraservice relief by way of a petition to the Air Force Board for Correction of Military Records, the court of appeals noted that there were serious doubts about the Board's ability to afford relief, inasmuch as Jorden sought reinstatement to the state Guard as well as to his position as a federal technician. See also *Christoffersen,* slip op. 13 (Corrections Board "has no power to

force Washington to reinstate appellants in the Washington Guard"); *Penagaricano* v. *Llenza,* 747 F.2d at 57 ("the [Board] has no power to force a state to reinstate the officer in the state's Air National Guard"). The Pennsylvania Air National Guard did not dispute that conclusion in its petition for a writ of certiorari. "Under these exceptional circumstances," we stated (at 8), in our Brief in Opposition in *Sajer* v. *Jorden,* No. 86-1382,[10] "we do not think that the court of appeals acted unreasonably in permitting Jorden to bring his constitutional claims directly to federal court."

In this case, by contrast, it is clear that other remedies are available to National Guard members such as Stinson. The National Guard's regulations prohibit discriminatory treatment, and NGR 600-21 sets forth procedures to be followed where a member of the Guard claims that he suffered discrimination. Indeed, Stinson invoked NGR 600-21 in challenging the decision not to select him for the supervisory position he sought.[11] Moreover, although the issue was not disputed by the Pennsylvania Air National Guard in *Jorden* and there was, therefore, no occasion for us to challenge the premise upon which the court of appeals' decision was based, we believe that members of the

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[10] The chief of the National Guard Bureau, a federal official, was a co-defendant in that case and, hence, a respondent in this Court because he did not join in the state's petition for a writ of certiorari or file one on his own behalf. See Sup. Ct. R. 19.6. We have furnished a copy of our *Jorden* brief to the parties in this case.

[11] It does not appear that Stinson exhausted the remedy available to him under that regulation, as he did not complain about his separation from the Guard, but limited his complaint to the charge that he should have been selected for the supervisory position he sought (see pp. 2-4, *supra*). Stinson could have obtained complete relief had the Guard concluded, in an investigation conducted pursuant to NGR 600-21, that he had been discriminatorily denied the supervisory position he sought and had been improperly separated from the Guard.

National Guard may well be able to obtain sufficient relief from a Board for the Correction of Military Records. Such Boards can order that members of the Guard be reinstated in comparable active federal reserve status and awarded back pay. Although a Correction Board cannot *order* reinstatement in the State National Guard, the practical reality appears to be that such relief is generally forthcoming. In this case, we are informed by the State of Alabama that such reinstatement in the State National Guard would follow as a matter of course from a decision of the Correction Board that Stinson had been improperly discharged.[12]

4. Where intraservice remedies are available to challenge specific military decisions, exhaustion of those remedies should be required before any judicial review is permitted, and such judicial remedy should be confined to review of the adequacy of the military proceedings.[13] Per-

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[12] Similarly, subsection (g) of Appendix E to NGR 600-21, states that where "an administrative review reveals deficiencies in compliance with law or regulation, the case will be returned to the State for appropriate corrective action."

[13] The Fifth Circuit in *Crawford* correctly noted (794 F.2d at 1036) that this Court's decisions permitting immediate recourse to the federal courts have involved attacks by military personnel on the facial validity of statutes or regulations. See, *e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503 (1986) (challenge to regulation prohibiting the wearing of a yarmulke); *Brown* v. *Glines*, 444 U.S. 348 (1980) (challenge to regulation requiring prior approval to solicit signatures on a petition); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (challenge to regulations directing discriminatory payment of spousal benefits). Immediate judicial review is less objectionable in such cases because it does not require intrusion into the specific military judgments made in particular instances. It is also more justified—especially where a violation of constitutional rights is asserted—given the broad-based effects of many statutes and regulations.

mitting a servicemember to bring an initial judicial challenge to a discrete personnel decision or other specific action by military authorities—and thereby make the federal courts an alternative forum, rather than a forum of last resort for such complaints—would undermine the system of remedies established by Congress within the armed forces. As this Court has noted (*Noyd* v. *Bond,* 395 U.S. 683, 696 (1969)): "If the military * * * do[es] vindicate [the servicemember's] claim, there will be no need for civilian judicial intervention. Needless friction will result if civilian courts throughout the land are obliged to review comparable decisions of military commanders in the first instance." See also *Orloff* v. *Willoughby,* 345 U.S. 83, 93-94 (1953). Thus, in *Crawford,* the Fifth Circuit properly dismissed claims for equitable relief brought by members of the Texas Army National Guard "without prejudice to the reviewability of any future actions taken by the Army Board for the Correction of Military Records" (794 F.2d at 1037).

Stinson should be required to seek relief through the channels specifically made available to him by Congress and the National Guard Bureaus. Under the *Mindes* test, which requires a servicemember to exhaust his intraservice remedies (453 F.2d at 201), he plainly may not bring a direct action under Section 1981 or 1983 in lieu of pursuing his intraservice remedies. Indeed, Stinson concedes that he has failed to pursue his intraservice remedies and agrees that he will "end up before the Army Board of Corrections of Military Records" (Br. in Opp. 3-4). This is correct. We disagree with Stinson only in that he apparently thinks that, if the Board rejects his claims, he may

then proceed with his suit under Sections 1981 and 1983. In our view, his exclusive remedy should then be an appeal from the Board's ruling to a district court, which would limit its review to determining whether the Board acted arbitrarily and capriciously. However, the issue of what remedies are available to Stinson if the Board rejects his claim is not ripe for review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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